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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1933

No. 575

JOHN L. GILVARY, PETITIONER,

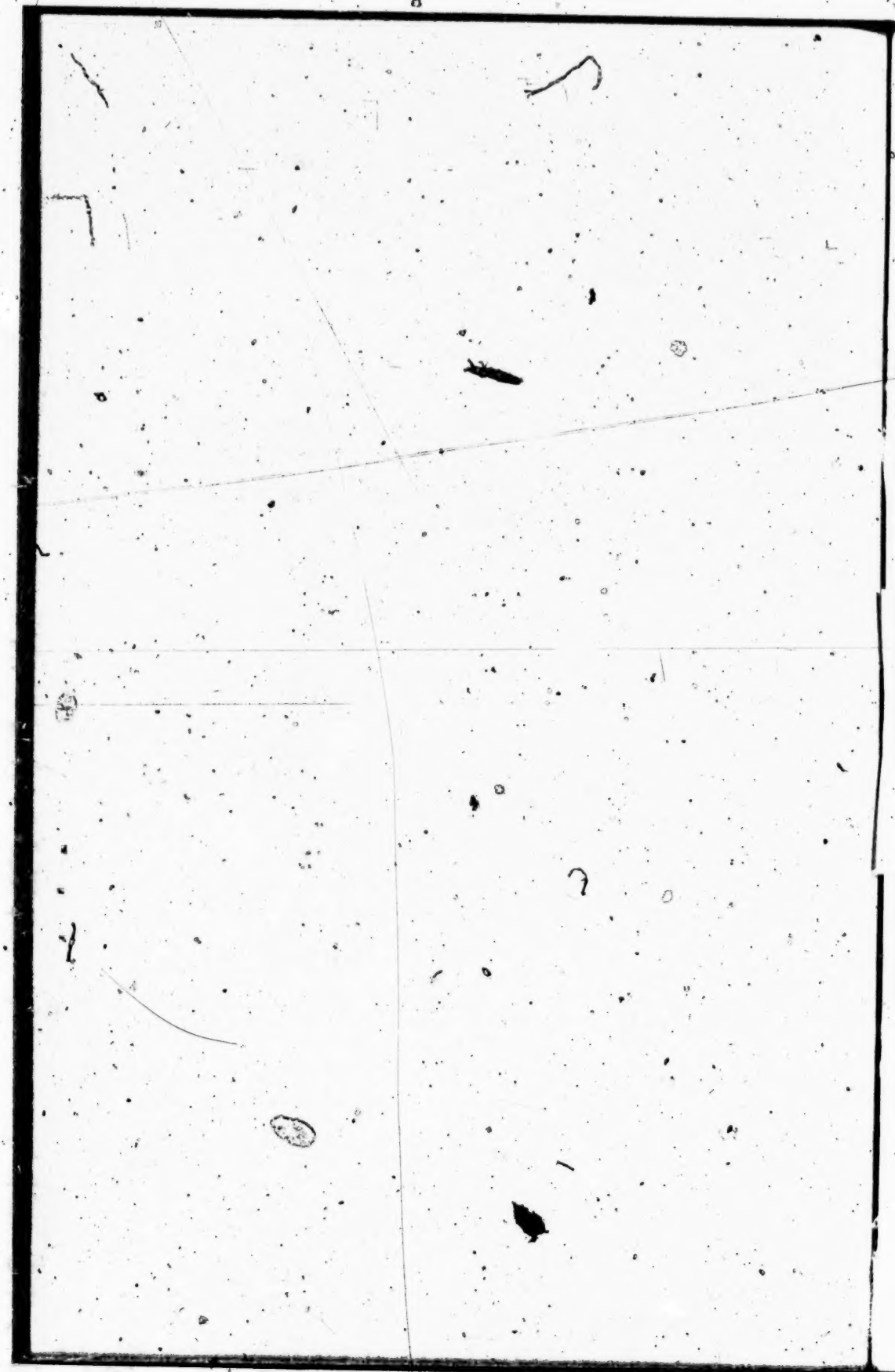
vs.

CUYAHOGA VALLEY RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

PETITION FOR CERTIORARI FILED NOVEMBER 8, 1933

CERTIORARI GRANTED DECEMBER 11, 1933



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INDEX

	Original	Print
Proceedings in supreme court of Ohio	1	1
Petition in error	1	1
Praecipe for summons	3	2
Record from court of appeals	4	3
Docket and journal entries	4	3
Petition in error	5	4
Motion to continue	8	6
Record from court of common pleas of Cuyahoga County	10	7
Docket and journal entries	10	7
Petition	12	9
Answer	17	12
Reply	19	14
Motion for new trial	20	14
Bill of exceptions	22	16
Caption	22	16
Plaintiff's opening statement	22	16
Defendant's opening statement	28	21
Plaintiff's reply statement	38	28
Defendant's motion for judgment	41	30
Colloquy	41	30
Order overruling motion for judgment	54	40
Stipulation withdrawing certain averments from petition	55	40
Testimony of John L. Gilvary	56	41
Testimony of Rudolph Heym	101	83

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 26, 1933

	Original	Print
Defendant's motion for directed verdict	106	87
Testimony of Herbert Melvin	106	87
Alvin Cornell	135	112
Michael Bawolak	143	119
E. B. Keppers	150	125
Charles Skuce	159	133
Thomas Murtaugh	171	143
Emil B. Flieger	173	146
W. N. Brechbill	176	148
Odolph J. Pintner	177	149
Fred T. Robertson	179	150
Ralph Wagar	183	154
Thomas Fitzgerald	187	158
E. O. Kerr	189	159
A. H. Gensley	194	163
John L. Gilvary (recalled)	202	171
Request that second and third defenses be withdrawn by the defendant from consideration of the jury	204	172
Defendant's request to charge	206	173
Defendant's exception to court's refusal to give request to charge No. 5	211	178
Defendant's written request to charge No. 5 (as amended)	213	179
Defendant's exception to court's refusal to give request to charge No. 8	215	180
Defendant's request No. 8 (as amended)	216	181
Motions made at conclusion of statement and at conclusion of plaintiff's case renewed	217	182
Court's charge to jury before argument	218	183
Plaintiff's exception to action of court in charging jury before argument; on requests Nos. 1, 2, 3, 4, 5, 6, and 8	221	185
Defendant's exception to action of court in refusing to charge jury before argument on request No. 7	221	185
Colloquy of court and counsel	221	185
Defendant's written request for charge to be incorporated in the court's general charge	223	186
Court's charge to jury	223	187
Defendant's exceptions to charge	233	194
Plaintiff's exceptions to charge	233	194
Verdict for plaintiff	233	194
Order overruling motion for new trial	234	195
Judgment on the verdict	234	195
Order settling bill of exceptions	235	196
Stipulation as to defendant's Exhibit "A"	236	196
Defendant's Exhibits 5 to 8, inclusive—Photographs	237	195A
Stipulation re defendant's exhibits	245	197
Docket and journal entries	246	198
Order allowing certiorari	248	200

[fols. a-1]

IN SUPREME COURT OF OHIO

No. 23,947

JOHN GILVARY, Plaintiff in Error,

vs.

THE CUYAHOGA VALLEY RAILWAY COMPANY, a Corporation, Defendant in Error

Error to the Court of Appeals of Cuyahoga County

PETITION IN ERROR—Filed in the Supreme Court

Plaintiff in error files this petition in error as of right upon the grounds hereinafter appearing, and says that at the September, 1932, term of the Court of Appeals of Cuyahoga County, Ohio, the defendant in error, in a case wherein the latter was plaintiff in error and the plaintiff in error was defendant in error, recovered a judgment by the consideration of said court against plaintiff in error, reversing a judgment theretofore had and obtained by plaintiff in error against said defendant in error in the Court of Common Pleas of said County, and entering final judgment against this plaintiff in error and in favor of defendant in error. A transcript of the record and of the docket and journal entries in said cause is filed herewith, together with a bill of exceptions setting forth all of the evidence in the [fol. 2] cause. There is error in said record in the following respects:

1. The case involved a construction of Article 2, Sections 34 and 35 of the Constitution of the State of Ohio, and of the provisions of General Code Section 1465-98 in the light of said constitutional provisions which were asserted as the basis of the defense interposed by the railroad to the petition of plaintiff, which was grounded upon the Federal Safety Appliance Act. In so construing and interpreting said constitutional provisions and statute as to reach a conclusion that such provision and statute warrant the denial of the Federal right asserted, the Court of Appeals gave an effect to Article 2, Sections 34 and 35 Ohio Constitution,

which brings said sections into conflict with Article 1, Section 8 of the Constitution of the United States, and in conflict with the Federal Safety Appliance Law, enacted pursuant thereto.

2. In rendering final judgment against plaintiff in error and in favor of defendant in error the Court of Appeals violated the provisions of Article 1, Section 5, Ohio Constitution, under which plaintiff in error is entitled to trial by jury of said cause of action based upon said Federal Act.

3. In holding that under Article 2, Sections 34 and 35, and General Code Section 1465-98, the plaintiff in error was barred from the assertion of his cause of action under the Federal Safety Appliance Law by reason of having previously filed a so-called "election" to submit a portion of his rights of a non-federal nature to the jurisdiction of the Industrial Commission of Ohio.

[fol. 3] Wherefore, plaintiff in error prays that said judgment of the Court of Appeals be reversed and that the judgment of the Court of Common Pleas in his favor be affirmed, and that he be restored to all things that he has lost thereby.

Bernsteen & Bernsteen, Attorneys for Plaintiff in Error. M. L. Bernsteen, J. E. Mathews, of Counsel.

IN SUPREME COURT OF OHIO

PRÆCIPE FOR SUMMONS

To the Clerk:

Please issue summons in error in the above entitled cause for the defendant in error, The Cuyahoga Valley Railway Company, and make service thereof on said defendant in error or upon its attorneys of record, Tolles, Hogsett and Ginn, and W. T. Kinder, Union Trust Building, Cleveland, Ohio. Make same returnable according to law, endorsing: "Petition in Error in Supreme Court of Ohio to reverse judgment of Court of Appeals of Cuyahoga County, Ohio."

Bernsteen & Bernsteen, Attorneys for Plaintiff in Error.

[fol. 4] In Court of Appeals of Ohio, Cuyahoga County, January Term, 1932

No. 12,597—Common Pleas 327,740

The Cuyahoga Valley Railway Company, Plaintiff,

vs.

John L. Gilvary, Defendant

Docket and Journal Entries

March 18th, 1932.—Petition in error, waiver of process, transcript and original papers from Common Pleas filed.

June 15th, 1932.—Brief of Plaintiff in Error, and two copies filed.

July 2nd, 1932.—Undertaking by Plaintiff to stay execution in $35,000.00 filed.

September 14, 1932.—Brief of Defendant and two copies and proof filed.

November 25th, 1932.—Motion to continue filed.

November 30th, 1932.—Brief of Plaintiff and two copies filed.

December 5th, 1932.—To Court: The motion to continue is overruled. Exceptions. Journal 9, page 440.

December 28th, 1932.—To Court: This cause came on to be heard upon the pleadings, and the transcript of the [fol. 5] record in the Court of Common Pleas, and was argued by counsel; on consideration whereof, the Court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and the judgment of the said Court of Common Pleas is reversed, for the reason that the acceptance and notice of election by the employer and employee contract approved by the Industrial Commission of Ohio is a complete bar to a right of recovery in this action and is therefore contrary to law, and final judgment is hereby rendered for Plaintiff in Error; no other error appearing on the record, and this cause is remanded to said Court of Common Pleas to carry this judgment into execution. The defendant in error excepts. Levine, Judge, dissents. Journal 9, page 466.

(Duly certified.)